SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
DEC 23 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-645

NATIONAL RIGHT TO WORK LEGAL DEFENSE AND EDUCATION FOUNDATION, INC.,
and
NATIONAL RIGHT TO WORK COMMITTEE,
Petitioners,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA AND ITS LOCALS 1093, 558 AND 25, *et al.*,
Respondents.

BRIEF IN OPPOSITION FOR RESPONDENTS

JOSEPH L. RAUH, JR.
JOHN SILARD
ELLIOTT C. LICHTMAN
HARRIETT R. TAYLOR
RAUH AND SILARD
1001 Connecticut Ave., N.W.
Washington, D.C. 20036
Attorneys for Respondents

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BRIEF IN OPPOSITION FOR RESPONDENTS

COUNTERSTATEMENT

This case arises from petitioners' efforts to block a discovery order in a suit asking that defendant Right to Work Foundation be enjoined from using employer funds to encourage and finance suits against unions in violation of federal law. The challenged disclosure order of the District Judge requires that defendants reveal the identities of a sample of 190 among over eight thousand of their employer-contributors under conditions of litigation confidentiality. Finding

that such evidence "goes to the heart of this litigation" and that there is "no other reasonable way for plaintiffs to obtain the information sought," the District Court ordered its disclosure. Defendants sought appellate review by a mandamus petition in the Court of Appeals and an accompanying interlocutory appeal to that Court. The Court of Appeals dismissed their interlocutory appeal, but simultaneously took under advisement defendants' mandamus petition and stayed the District Court's order. We demonstrate herein that no substantial question is presented by the lower court's dismissal of defendants' appeal.

* * * *

This suit was filed in 1973 by ten labor unions and their affiliates against two national "right to work" groups financed by employers to attack union security and union organization. Plaintiffs assert that defendants are using employer money to encourage and finance "right to work" suits by dissident employees against their unions, in violation of the second proviso to Section 101(a)(4) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C § 401.[1] The discovery proceedings already conducted in this case give substance to that claim and to the high materiality of the limited disclosures plaintiffs seek regarding the identities of a sample of 190 among thousands of employer-contributors to the Right to Work Foundation's operations.

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[1] "No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legis-

1. *The National Right to Work Committee.* The defendant National Right to Work Committee advertises itself as a "Coalition of Employees and Employers" (Larson deposition transcript in the District Court [hereinafter "tr."] 584-585). It was publicly launched in 1955 under the chairmanship of Edwin S. Dillard, a North Carolina manufacturer, with former Congressman Fred Hartley, Jr., as its President. The Committee announced its plan to fight various forms of union security arrangements and agreements (tr. 30-31). It is clear that the initial funding of the National Committee was from employers and business interests. Five of the six known Committee founders were employers or others affiliated with corporations and business entities (see Plaintiffs' Answers to Set Number One of Interrogatories by Defendants [hereinafter "Plaintiffs' Answers"] at Appendix E, pp. 3-5). Indeed, defendants have admitted that as late as 1973 the sum of $840,546 — *representing 84% of the Committee's proposed $1 million budget for that year* (tr. 316)—came to the Committee in contributions from corporations, businesses, and other employers (Defendants' Response to Plaintiffs' Set Number III of Interrogatories, answer 7(c)). The Committee has long advertised to its donors the business deductibility of their contributions (Larson Deposition Plaintiffs' Exhibits Nos. 51 and 52).

From the beginning, the National Committee's operations were directed to propaganda campaigns,

lature or to communicate with any legislator: . . . *And provided further, That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition*" (emphasis added).

lobbying, film distributions, speeches to employees, and other public activities advancing the interests of the funding employers to inhibit or eliminate the union shop, the agency shop, the checkoff, and other forms of union-dues support. In the mid-1960s the Committee added litigation as a weapon in its arsenal (tr. 764, 765, 787, 790, 839, 842-843). Several major suits, some fomented and all of them funded by the Committee, were filed at that time by employees against their unions challenging agency shop agreements between the union and the employer, and particularly challenging the use of their union payments for political activities (*id*). Among these Committee-financed union security challenge suits were *Reid* v. *McDonnell Douglas Corp.*, which was ultimately dismissed (*Reid* v. *Automobile Workers*, 479 F.2d 517, C.A. 10 (1973), cert. denied, 94 S.Ct. 592 (1973)), and *Seay* v. *McDonnell Douglas Corp.*, which has also been dismissed (85 LRRM 2007, Dist. Ct., C.D. Calif., 1973). In 1968 the Committee decided to enhance its litigation function by creating a tax-exempt litigating arm which would obtain charitable deductibility status under Section 501(c)(3) of the Internal Revenue Code. Accordingly, by a 1968 resolution of the Committee's Board of Directors, there was created the "National Right to Work Legal Defense and Education Foundation, Inc." Nine of the eleven members of the Foundation's Board of Trustees are also on the Board of Directors of the Committee (tr. 69), and the two organizations are run from the same offices by the same executive director, Mr. Reed Larson (tr. 78, 80-82, 35).

2. *The National Right To Work Foundation.* Since its inception, the defendant Foundation has

financed some 50 litigations throughout the United States by employees and union members against their unions, challenging the legality of various forms of union security and union support requirements contained in contracts and agreements with employers (tr. 753, 818). The few examples given by petitioners (Pet. 6) of the types of cases in which they provide legal assistance are far from representative. Of some fifty cases they are financing, only the *Sidberry* case alleges racial discrimination, and only two (including *Richardson*) allege an assault or other form of physical violence. By contrast, seven challenge union use of dues or agency fees for political purposes; twenty-eight challenge the "union shop" requirement that employees pay dues or agency fees to the union; and six others challenge the union hiring hall or other means by which union members are allegedly given preference over non-members.

Hardly any of the Foundation's suits have succeeded, but the Foundation has steadily grown richer, attaining by 1972 an annual contributions level of $1,727,572 (Defendants' Answers to Set Number I of Interrogatories by Plaintiffs, answer 1). Defendants have already conceded that $609,794.56 of that amount appears on their own records as having been given by 8,361 employers (Defendants' Answers to Set Number II of Interrogatories by Plaintiffs, answers 2(a) and 2(c)). Actually, plaintiffs believe and intend to show upon further discovery that the employer portion of the Foundation's annual contributions income is well over 50%, and indeed closer to the 84% employer support already conceded by defendants in the case of the Committee's annual income.

3. *The Complaint.* Employer financing, by and through the Committee and the Foundation, of a nationwide campaign of suits by dissident employees was deemed by the plaintiff unions who have suffered from that campaign a violation of the second proviso to Section 101(a)(4) of the Act. That proviso bars interested employers from "directly or indirectly" financing suits by union members. Accordingly, in 1973 plaintiffs instituted this action, whose first claim seeks an injunction against the continued contribution of financial support by interested employers through the defendant Committee and Foundation to suits by union members against their unions.

4. *Proceedings Below.* Defendants moved to dismiss the Complaint on a variety of grounds, including objections to the jurisdiction of the Court and a claim that the "interested employer" ban of the Act applies only to the immediate employer of the employee who is suing his union. Plaintiffs opposed the motion, contending that jurisdiction was clear under the specific terms of Section 102 of the Act. As to defendants' second point, plaintiffs demonstrated that both the language and the legislative history of the "interested employer" proviso repel defendants' "immediate employer" construction. As concerns language, the proviso prescribes that with respect to "an action in any court, or in a proceeding before any administrative agency" brought by a labor organization member, "*no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.*" This language repels the defendants' limiting construction. If Congress intended to bar by the "interested employer" terminology only

litigation support by the immediate employer of the union member instituting an action or proceeding, then it could have used different language apt to the purpose; it could have said simply that it was barring litigation support by an employer to his employees. But Congress did not do this and the words "interested employer" simply do not connote the narrow intention urged by defendants.

Moreover, there is dispositive legislative history on the Senate floor (105 Cong. Rec. 6724-6725), where the proviso was added to the Section 101(a)(4) text as offered by Senator McClellan.[2] The original language of the proposed proviso, introduced by Senator Kuchel, stated that "*no employer or employer association*" could provide financing or encouragement to suits covered by the section. However, Senator Goldwater proposed that the "no employer" language be amended so as to bar financing only by any employer who has a "dispute, controversy, contract, connection, or relationship of any kind in any area of activity, with the labor organization against which such action or proceeding has been or is being brought by such member." Senator Clark immediately objected that this might open up "an undesirable loophole," by permitting employers "who just did not like unions generally to finance the activities which they are forbidden to finance or encourage . . ." After further expressions of reluctance by the proponents of the proviso, Senator Goldwater persisted that even a loan from a personal friend of the employee, who happened to be an employer, was precluded by the "no employer" language, and Senator Mundt added that a loan from a bank

[2] See Appendix, *infra*, for the originating legislative history of the "interested employer" prohibition.

would be similarly proscribed. To settle the matter, Senator Kuchel offered the compromise "interested employer" language, which was accepted by all. Senator Goldwater requested that "the proponents of this interesting word 'interested' " explain it in order "to make a legislative history" and Senator Allot asked whether the language as amended would "include 'any' employer? Let us assume that the employer is in the general grocery business. Would the word 'interested' include any other employer?" Senator Javits responded for the proponents:

> "I think it probably would if the litigation involved the union in the whole line of business . . ."

From this record, it is clear that far from confining the proviso's inhibition only to the immediate employer of the litigating employee, it was the intent of the Congress to permit employer financing of employees' suits against their unions only in rare and unusual cases such as the personal friend or the bank loan situation where the contributing employer has no economic stake in the subject or the outcome of the union member's suit.

On October 24, 1973, defendants' motion to dismiss was rejected by the District Judge. Upon careful analysis, the Court's jurisdiction of the first cause of action was upheld under the specific terms of Section 102 of the Act (Memorandum Opinion at pp. 2, 3-5). As to defendants' "immediate employer" argument, the District Court noted (Memorandum Opinion at p. 6, n. 2) that they had failed to make any verified claim that none of the immediate employers of the employees who have sued unions with Foundation support have contributed to the Foundation, and thus

the statutory construction question was not presented for resolution.

5. *The Disclosures Sought.* On December 13, 1973, plaintiffs filed the interrogatories which are the basis of the District Court's order of June 5, 1974, compelling disclosure. When disclosure was refused concerning employer contributions to the Foundation, on January 18, 1974, plaintiffs moved in the District Court for an order requiring defendants to reveal, under conditions of litigation confidence, the names of some 190 of the more than eight thousand employer contributors to the Foundation. These included 1) the names of any contributing employers among the 116 employers publicly and frequently listed by the Foundation in its brochures as the members of its "Business Advisory Council" and 2) 74 other employer donors' names — the 37 employers who admittedly donated between $500 and $5000 each in 1972, and another 37 taken at random from among employers who contributed less than that amount in 1972.

The function of the limited disclosures sought was made clear in plaintiffs' Memorandum Supporting Motion to Compel Answers to Interrogatories. Plaintiffs there pointed out that the central question for trial in this case is whether the employers contributing vast amounts annually to the Foundation's financing of suits by union members against their unions are "interested employers" witnin the meaning of the statute. Plaintiffs urged (at pp. 4-5) that the limited disclosure sought of a sample of contributing employers' names would enable plaintiffs to test and to demonstrate employer "interest" along five separate lines of relevant inquiry into that question:

i. One key area of inquiry is whether the contributing employers include employers engaged in the same "lines of business" as the labor unions against whom the defendants are financing suits by dissident employees. As we have noted (supra, pp. 7-8), the legislative history of the 'interested employer" clause of the statute makes clear that an employer in the same line of business would be an "interested employer." Indeed, in their brief in the District Court on the disclosure issue (Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion to Compel Answers to Interrogatories), defendants themselves conceded the materiality of the "same line of business" inquiry, for in their own view Congress intended that an employer is an "interested employer" when he is "in the same line of business." As they put it (at p. 7):

> "The legislative history of § 101(a)(4) shows, therefore, that Congress, particularly the Senate, envisioned a union member's lawfully securing assistance to sue his union from anyone except an employer whose own activities or economic interests were in the same line of business as the employer whose union member employees were in litigation."

ii. A second key line of inquiry plaintiffs would pursue upon disclosure of a sample of the contributing employers' names is whether the employers have any relationship with the unions who are defendants in the Foundation-financed employee suits. As we have shown (supra, pp. 7-8), in precipitating the change on the Senate floor from the original "no employer" to the ultimate "no interested employer" terminology, Senator Goldwater had initially offered an amendment which the sponsors found too extreme and rejected. But significantly, even Senator Goldwater's proposed

amendment would have applied the bar of the proviso to any employer who has a "dispute, controversy, contract, connection, or relationship of any kind in any area of activity . . ." with the labor organization being sued. Plaintiffs plan to show upon disclosure of 190 employer identities that a portion of the Foundation's employer contributors meet the Congressional understanding that an employer with any kind of relationship to a union defending a member's suit is barred by the proviso from financing that suit.

iii. A third key inquiry plaintiffs would pursue is whether any of the sample of contributing employers have union security contracts. Almost all the Foundation-financed employee suits seek to invalidate agency shop or other union security agreements. Employers with union security agreements obviously have an immediate economic "interest" in test suits which seek to invalidate such agreements. It is the nub of the Seventh Circuit's ruling in *Adamszewski* v. *Local 1487, Machinists,* 496 F.2d 777 (1974), cert. denied, 43 U.S.L.W. 3280 (U.S. Nov. 12, 1974) (No. 74-231), that "*a practical business interest in the suit*" meets the financing ban of the proviso (at p. 784). Plaintiffs desire disclosure of employer donors' names to meet this pragmatic test of employer interest.

iv. A fourth area of inquiry is whether employers supporting the Foundation are also supporting the defendant Committee, because the Committee is demonstrably engaged in a variety of directly anti-union activities, including the use of anti-union and anti-strike moving pictures (see Plaintiffs' Answers, answer 8, at pp. 22-23), literature (tr. 291, 317, *et seq.*) and even direct lobbying against such measures as the

extension of the National Labor Relations Act to agricultural workers (tr. 364).

v. A fifth significant line of inquiry plaintiffs desire to pursue upon identification of a sample of the employer donors to the Foundation concerns other anti-union activities of the contributing employers, which may underscore the basis of their donations to the Foundation.

6. *Proceedings on Plaintiffs' Discovery Motion.* Defendants extensively briefed their opposition to the disclosures sought.[3] Oral argument was had on May 2, 1974, defendants being represented before the court by Mr. Whitney North Seymour of New York. Upon due deliberation, on June 5, 1974, the District Court entered an Opinion and Order (Pet. 9A) compelling disclosure of the names sought, under the litigation confidentiality restriction which plaintiffs had included in their proposed order.

As the District Court made clear in its subsequent Order of June 20, 1974, refusing to certify the case to the Court of Appeals (Pet. 13A-15A), the central question presented is governed by the ruling of the Court of Appeals in *Carey* v. *Hume*, 492 F.2d 631 (C.A.D.C., 1974), cert. dismissed, 94 S.Ct. 2654 (1974), that the First Amendment is not an absolute barrier to the compelled disclosure of material evidence necessary to

[3] Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion to Compel Answers to Interrogatories and Defendants' Response in Opposition to Plaintiffs' Reply Memorandum Supporting Motion to Compel Answers to Interrogatories. See, also, the earlier Defendants' Memorandum of Points and Authorities in Support of Motion for Protective Order [filed October 24, 1973] and Defendants' Response to Plaintiffs' May 2, 1974 Memorandum Regarding Section 101(a)(4) [filed May 13, 1974].

litigation of the issues. The District Court emphasized (Pet. 14A) that the information plaintiffs here seek "goes to the heart of this litigation," that plaintiffs had "demonstrated good cause for obtaining the necessary information," and that "there is no other reasonable way for Plaintiffs to obtain the information sought."

On June 27, 1974 defendants filed in the Court of Appeals a petition for writ of mandamus to review the District Court's disclosure order and also an attempted appeal from that order. On June 28, 1974 the Court of Appeals issued an order (Pet. 11A) dismissing the appeal, "this Court not having jurisdiction over the order appealed from," and another order (Pet. 16A) establishing an expedited briefing schedule on the mandamus petition and staying the disclosure order of the District Judge. Rather than awaiting disposition of their mandamus petition by the Court of Appeals, defendants seek review here of that Court's dismissal of their interlocutory appeal. We demonstrate below that the dismissal action presents no substantial question for review.[4]

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[4] Defendants' petition also purports, in the second of their "questions presented," to bring to this Court the substance of their claim of constitutional immunity from being required to reveal the information encompassed in the District Court's disclosure order. But that claim is not properly presented here before its adjudication by the Court of Appeals. In any event, we demonstrate in Point II of the Reasons for Denying the Writ that there is no substance to petitioners' claim of constitutional immunity from an order for disclosure of evidence highly material in this civil litigation.

REASONS FOR DENYING THE WRIT

I

NO SUBSTANTIAL QUESTION ARISES FROM DISMISSAL OF PETITIONERS' ATTEMPTED INTERLOCUTORY APPEAL.

Petitioners ask this Court to review the determination by the Court of Appeals that it has no jurisdiction over their attempted interlocutory appeal of the District Court's disclosure order. But even the occasions when this Court has approved the use of the extraordinary "all writs" authority to review interlocutory rulings are few and far between, restricted to most unusual situations. See, e.g., *Ex Parte Peru*, 318 U.S. 578 (1943); *La Buy* v. *Howes Leather Co.*, 352 U.S. 249 (1957); *Schlagenhauf* v. *Holder*, 379 U.S. 104 (1964); *United States* v. *United States District Court*, 407 U.S. 297 (1972). The present case does not even present a basis for review by the extraordinary writ, much less for review by appeal. Where there has been attempted an interlocutory appeal of a discovery order, this Court long ago has held it unavailing. See *Cobbledick* v. *United States*, 309 U.S. 323, 326 (1940), reaffirming *Alexander* v. *United States*, 201 U.S. 117 (1906); cf. *United States* v. *Ryan*, 402 U.S. 530 (1971). The possible exception reflected in this Court's recent ruling in *United States* v. *Nixon*, 94 S.Ct. 3090 (1974), was expressly restricted to "the unique setting" in which that case arose (94 S.Ct. at 3099). By contrast, defendants' claim of right to appeal an ordinary disclosure order in a civil suit would open the door to wholesale interlocutory review of discovery rulings in the federal courts. The present rule, requiring that an objecting party who desires to test the issue in the appellate courts refuse the order of disclosure and seek review of the ensuing contempt or other sanction imposed, is the one which Congress intended and this

Court has approved (*id.*). Experience indicates that in cases of genuine objection to disclosure that procedure serves to protect parties in civil litigation without inviting the wholesale interlocutory review which Congress has not authorized.[5]

Moreover, the proposed issue for this Court's resolution evaporates completely in view of the fact that the Court of Appeals when it dismissed the interlocutory appeal nevertheless took under advisement defendants' petition for mandamus and stayed the District Court's disclosure order. Thus, defendants, in attacking the dismissal of their appeal, can present to this Court only a lifeless issue lacking any impact in the present case. Finally, as we proceed to show, all apart from the sterility of the jurisdictional question they present there is also no merit at all to defendants' attack upon the District Court's order that they disclose relevant evidence which goes to the essence of the pending civil suit.

II

PETITIONERS HAVE NO PLAUSIBLE CONSTITUTIONAL BASIS FOR REFUSING DISCLOSURE OF THE MATERIAL EVIDENCE SOUGHT BY PLAINTIFFS.

Finding that the information "goes to the heart" of the case, the District Court granted plaintiffs' request for disclosure under conditions of litigation con-

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[5] In addition to contempt appeals there is also the safety valve, in cases of genuine doubt, of the certified question procedure. That procedure was adopted in a recent discovery case (*Carey* v. *Hume*, 492 F.2d 631 (C.A.D.C., 1974), *cert. dismissed*, 94 S.Ct. 2654 (1974)), but in this case the District Judge, applying *Carey*, found no unresolved controlling question of law presented which would warrant a certification (Pet. 13A-15A).

fidence of the names of a sample of 190 employers among more than eight thousand employer-contributors to the defendant Foundation. The District Judge in so ruling did not transgress the First Amendment because the Constitution does not shield a party in civil litigation from disclosure of material evidence. Defendants are quite mistaken in their suggestion (Pet. 15-16) that *NAACP* v. *Alabama*, 357 U.S. 449 (1958), makes the First Amendment a basis for concealment of relevant evidence properly related to a legitimate inquiry. This Court there (at p. 463) held only that in a First Amendment-protected area there must be an "interest in obtaining the disclosures" which is "sufficient to justify the deterrent effect" of the disclosures. That sufficient interest has been defined in a long series of rulings, beginning with *Watkins* v. *United States*, 354 U.S. 178, 208-215 (1957), as arising from the relevance of the information to a legitimate legislative or judicial inquiry. See, e.g., *Scull* v. *Virginia*, 359 U.S. 344, 352-353 (1959); *Bates* v. *Little Rock*, 361 U.S. 516, 525 (1960); *Gibson* v. *Florida Legislative Investigation Committee*, 372 U.S. 539, 551 (1963). Accordingly, relevant evidence can neither be withheld in criminal proceedings (*Branzburg* v. *Hayes*, 408 U.S. 665 (1972); *United States* v. *Nixon*, 94 S.Ct. 3090 (1974)) nor in civil litigation (*Garland* v. *Torre*, 259 F.2d 545, (C.A. 2, 1958), cert. denied, 358 U.S. 910 (1958), approved in *Branzburg* at p. 686; *Carey* v. *Hume*, 492 F.2d 631, (C.A.D.C., 1974), cert. dismissed, 94 S.Ct. 2654 (1974)). Of course, before enforcing disclosure there must be a showing both of materiality and unavailability. Here

the District Judge specifically found both materiality and unavailability (Pet. 14A).[6]

If, as is clear, the District Judge ordered disclosure of evidence highly material in this civil litigation and not otherwise obtainable, defendants have no First Amendment shield against the disclosure. However, they also contend that the statute must be construed not to prohibit employer contributions to their activities, and that since the suit is thus faulty on its merits no evidentiary disclosures should be required. Assuming *arguendo* that defendants can thus put the cart before the horse, achieving interlocutory resolution of merits statutory construction questions so as to avoid discovery, nevertheless neither of their statutory construction contentions has any validity:

(1) Defendants' first contention (Pet. 9-10) is that the proviso prohibiting interested employer financing of members' suits is confined to suits brought

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[6] Defendants insisted before the District Judge, and continue to plead here (Pet. 18) that plaintiffs could determine the extent and character of the "interest" of the Foundation's employer-contributors by deposing the immediate employers of the employees who are suing the unions with the Foundation's financing. However, the employer financing attacked in this litigation is not by those 40 or 50 companies, but by the many thousands of employers who use the Foundation as a front and conduit to finance anti-union litigation throughout the nation. As we have shown (*supra*, pp. 7-8) the legislative history makes quite clear, and defendants have even conceded that the "interested employer" prohibition is not confined to the immediate employer of the member suing his union, but includes all those in "the same line of business" or otherwise having an interest in the member's action against his union. Thus the District Court properly found that there is no alternative source of the information needed by plaintiffs—a sample of the names of the thousands of employers who are financing the Foundation's operations.

under the Landrum-Griffin Act, or even more narrowly to suits brought under Title I of that Act. Actually, *that contention* may be of no avail to defendants because at least five of the dissident member suits financed by the Foundation plead in their complaints a Landrum-Griffin Title I claim,[7] while two others plead claims under Title V of the statute.[8] In any event, there is not a word in the text or the legislative history which would sustain restriction of the proviso to suits asserting Landrum-Griffin violations.[9] Indeed, Senator Goldwater, in the course of amending the preceding proviso of the same section made clear that § 101 (a)(4) is *not* confined to suits under Landrum-Griffin; rather the Senator emphasized that one of the most significant anticipated applications of the section was where a union might seek to inhibit a member from

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[7] *Braden* v. *Local 146, Sheet Metal Workers' International Assoc. and Paul Mueller Company* (Civil Action No. 2829, U.S.D.C. for W.D. of Mo., Southern Div.); *Fishgold* v. *American Federation of Musicians, et al.* (72 Civil 5008, U.S.D.C. for S.D. of New York); *Forrester* v. *Operative Plasterers' & Cement Masons International Assoc., et al.* (Case No. 2689, U.S.D.C. for W.D. of Mo., Southern Div.); *Gabauer* v. *Woodcock, et al.* (72 C 164 (2), E.D. Mo.); *Huskey* v. *Woodcock, et al.* (72 C 165 (4), E.D. Mo.).

[8] *Gabauer, et al.* v. *Woodcock, et al.* (72-C-180(A), E.D. Mo.); *McNamara, et al.* v. *Johnston, et al.* (CA No. 71-C-654, N.D. Ill.).

[9] See "Legislative History of the Labor-Management Reporting and Disclosure Act of 1959" (Department of Labor) *passim*, and especially Section by Section Analysis in the Senate at 239; Remarks of Rep. Barden at 240; Remarks of Sen. Mundt at 241; Remarks of Sen. Kennedy at 300; Remarks of Sen. Goldwater at 300-301; Testimony of Senator Goldwater at 307-308; Statement by Chamber of Commerce at 317; Remarks of Rep. Landrum at 317-318; Statement by Mr. Meany at 322, 328, 331; Remarks of Rep. Elliott at 331, 332; Remarks of Rep. Foley at 333; Remarks of Sen. Kennedy at 360-361; Remarks of Sen. Griffin and Sen. Goldwater at 361.

seeking redress before the National Labor Relations Board. (See "Legislative History of the LMRDA of 1959," pp. 307-308 (Dept. of Labor)). The Senator's construction has been judicially approved. *Roberts* v. *NLRB*, 350 F.2d 427, 429-430 (C.A.D.C., 1965); *Industrial Union* v. *NLRB*, 379 F.2d 702, 708 (C.A. 3, 1967). This history makes perfectly clear that the "right to sue" guarantee of § 101(a)(4) is not confined to suits under LMRDA, and *a fortiori* neither is its second proviso. The plain language, the legislative history, and the judicial rulings thus preclude defendants' constructional shrinkage of the proviso.[10]

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[10] Contrary to petitioners' claim, the Seventh Circuit's ruling in *Adamszewski* v. *Local 1487, Machinists*, 496 F.2d 777, *cert. denied*, 43 U.S.L.W. 3280 (U.S. Nov. 12, 1974) (No. 74-231) *does not hold that the proviso is confined to Landrum-Griffin suits*, but only that union members' rights of action under other statutes which are preserved by Landrum-Griffin's savings clauses will not be judicially *dismissed* because of illegal employer financial aid. Petitioners would obscure the clear distinction between the dismissal of a suit financed in violation of the proviso and direct enforcement of the proviso's own prohibition by an injunction against continuing violations, as sought in this case. That distinction is critical in view of the reason given by the Seventh Circuit for declining to make the proviso's violation the basis for dismissal of the employee's Railway Labor Act claim. The Court relied upon two savings provisions in the LMRDA (29 U.S.C. §§ 413 and 523(b)) which generally preserve employee rights of action under the NLRA and the Railway Labor Act (496 F.2d at 785, n. 7 and n. 8). The Court made the RLA savings clause the express basis of its ruling (496 F.2d at 784-785) that the proviso's violation "does not preclude relief sought" under the Railway Labor Act and plaintiffs were "not therefore precluded by 29 U.S.C. § 411 from pursuing any other remedies properly brought." We agree with the Seventh Circuit's reconciliation of the proviso and the savings clauses but here the question is whether employers may be enjoined from continuing to violate the proviso. Nothing in the *Adamszewski* holding of non-dismissability suggests that the proviso is inapplicable to an employers' contributions to a union member's action pressing claims under statutes other than LMRDA.

(2) Equally fallacious is petitioners' alternative suggestion (Pet. 19) that *NAACP* v. *Button*, 371 U.S. 415 (1963), supports their refusal to disclose the identities of any contributing employers, on the ground that the statute cannot constitutionally be applied to inhibit the Foundation from using employer money to finance dissident employees' suits against their unions. Here the nub of the litigation-financing prohibition which Congress has adopted is the historic principle of our national labor law which requires employers to stay out of internal union affairs and controversies. In forbidding employers to finance dissident members' suits against their unions as a means of advancing the employers' own economic interests against labor, Congress has applied a bedrock labor law principle banning employer interference in the relations between a union and the employees it represents.

That principle was first embodied in Section 10 of the Erdman Act of 1898 (30 Stat. 424) prohibiting the "yellow dog contract" by which employers had required their employees not to become union members. Its next manifestation was in the Railway Labor Act of 1926, which established the basic right of union action and membership free of "interference, influence, or coercion" by employers (45 U.S.C. § 152, Third). This Court upheld the statute on the ground that the employers "have no constitutional right to interfere with the freedom of the employees in making their selections" of union representatives. *Texas & N.O.R. Co.* v. *Ry. Clerks*, 281 U.S. 548, 571 (1929). Strengthening provisions were adopted in the 1934 Railway Labor Act, upheld by the ruling in *Virginian Ry. Co.* v. *System Federation*, 300 U.S. 515 (1937), which enjoined a carrier from "interfering with, influencing or coercing its shop craft employees" in their union

activities (at 538). Even more stringent protections were incorporated in the 1932 Norris-LaGuardia Act, which declared (29 U.S.C. § 102) the Congressional purpose that employees "shall be free from the interference, restraint, or coercion of employers of labor, or their agents . . ."

The principle was further extended and confirmed in 1935 by the National Labor Relations Act. That statute expressly preserves workers' rights of union organization against all forms of employer interference or coercion (29 U.S.C. § 151). This Court recognized in that respect that "coercion to prevent the free exercise of the right of employees to self-organization and representation is a proper subject for condemnation by competent legislative authority." *Labor Board* v. *Jones & Laughlin*, 301 U.S. 1, 33 (1936). The Act (§ 158(a)(2)) also forbids an employer to "interfere with the formation or administration of any labor organization or contribute financial or other support to it." This Court emphasized that in that respect the statute embodies the important policy "to free the collective bargaining process from all taint of an employer's compulsion, domination, or influence." *Machinists* v. *Labor Board*, 311 U.S. 72, 80 (1940). Among the forbidden means of interference are an employer's insistence on a particular method of employee voting on a union strike-call (*Labor Board* v. *Borg-Warner*, 356 U.S. 342 (1958)), or his bypassing of union negotiators to deal directly with the membership (*Labor Board* v. *Katz*, 369 U.S. 736 (1962); *NLRB* v. *General Electric Co.*, 418 F.2d 736 (C.A. 2, 1969)). Even the employer's good faith will not validate his mistaken interference in the employees' choice of their bargaining representative. *Garment Workers* v. *Labor*

Board, 366 U.S. 731 (1961). Strengthening amendments adopted in 1947 forbid (in § 186(a)) an employer giving "any money or other thing of value to any representative of any of his employees," a provision adopted in order to preclude "bribery of employee representatives by employers." *Arroyo* v. *United States*, 359 U.S. 419, 425-426 (1959). In 1959 the prohibition on employer payments was extended to cover employer associations, labor relations experts, and any person or association "who acts in the interest of an employer" (*id.*).

The second proviso to § 101(a)(4), adopted in 1959, which the present litigation seeks to vindicate, is but one more application of the principle barring employer interference in union affairs. On the one hand the body of § 101(a)(4) guarantees to members the right to sue their union in any judicial or administrative forum; on the other hand it equally prohibits any "interested employer" or employer association from "directly or indirectly" fostering or financing such suits. Thus, unlike *NAACP* v. *Button*, 371 U.S. 415 (1963) and following rulings cited by defendants (Pet. 19), there is here a wholly legitimate legislative purpose rooted in the fundamentals of our labor law—the guarantee of employer neutrality and non-interference in union affairs—which validates the statutory prohibition on interested employer financing of members' suits against their unions. That valid legislative purpose puts this case quite beyond and apart from governmental attempts to ban the litigating activities of the NAACP or the ACLU.[11]

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[11] The defendant Foundation's entire litigation-financing program is confined to employees' suits against their unions, most of them to enjoin collection of union dues or agency shop payments. Should the ACLU or the NAACP undertake a special program fi-

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Petitioners' *NAACP* v. *Button* contention is also fallacious because it is clearly premature for petitioners to claim (Pet. 18) that "the Foundation is constitutionally no different from" the NAACP or ACLU. Such a constitutional claim is surely not resolvable before the crucial facts are disclosed and a trial has been had, particularly when asserted in an effort to justify concealment of the constitutionally relevant facts. Resolving the constitutionality of the proviso's application to prohibit interested employer funding of the anti-union suits financed by the Foundation requires a trial to determine critical facts: the fact that the Committee and Foundation are chiefly financed by and act as fronts for employers; that the Committee undertakes direct anti-union lobbying, publications, and other activities and is operated hand-in-glove with the Foundation by the same executive director; that the Foundation-financed suits by dissident unionists to enjoin or confine agency shop and union shop contracts are in the direct economic interest of employers seeking to weaken union solidarity and treasuries; that the Foundation has an inter-employer fund solicitation campaign which appeals directly to employers' interests in inhibiting the operation of union security arrangements. These and similar facts elucidated and resolved by a trial constitute the indispensable predicate for adjudicating defendants' claim that the statute cannot constitutionally be applied to bar interested employers from funding the Right to Work Foundation's financing of suits by employees against their unions, for Congress surely can prohibit employers from

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nancing such suits against unions by their members, the § 101(a)(4) proviso would equally bar interested employers from providing the funding for such a program, and we suggest that it would validly do so in view of the crucial statutory purpose behind the proviso's adoption.

seeking to advance their own economic cause by financing back door attacks on labor through dissident member suits against unions.

This Court has recognized ever since *Borden's Co.* v. *Baldwin*, 293 U.S. 194, 212 (1934), that before constitutional challenges are resolved "the facts essential to their decision should be definitely found by the lower courts upon adequate evidence." Applied again in *United States* v. *Auto. Workers*, 352 U.S. 567, 591 (1957), the rule was recently invoked in *Askew* v. *Hargrave*, 401 U.S. 476, 479 (1971), where the Court emphasized that the constitutional claim "should not be decided without fully developing the factual record at a hearing." At this juncture, therefore, defendants cannot make the alleged invalidity of the statute's ultimate application to their activities a ground for concealing the information which can disclose that the contributing employers do indeed have concrete economic interests which validly invoke the statutory proviso's prohibition. Thus, petitioners have no plausible constitutional basis for refusing disclosure of the material evidence sought by plaintiffs.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOSEPH L. RAUH, JR.
JOHN SILARD
ELLIOTT C. LICHTMAN
HARRIETT R. TAYLOR
RAUH AND SILARD
1001 Connecticut Ave., N.W.
Washington, D.C. 20036
Attorneys for Respondents

APPENDIX

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LEGISLATIVE HISTORY OF THE SECOND PROVISO TO SECTION 101(a)(4), LMRDA

(105 Cong. Rec. 6724-6725) (April 25, 1959)

"*Mr. Goldwater.* Mr. President, as time is running out, wish to turn to page 4 of the amendment, and invite the ttention of the Senator from California to line 4, page 4:

> That no employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

I think that is a good provision. I agree with the enator from California, which may surprise him.

Mr. Kuchel. No; it does not surprise me. I think the enator from Arizona is one Member of the Senate who serves the salute of all of us for the constant attention has given in this field.

Mr. Goldwater. I thank the Senator.

I ask the Senator from California if he would accept an nendment in the form of an addition; on page 4, at the d of line 6, before the period, to add the following words: nless such employer has no dispute, controversy, con- ct, connection, or relationship of any kind in any area activity, with the labor organization against which such ion or proceeding has been or is being brought by such mber.'

et us say a businessman is a neighbor of a union mber, and he is trying to finance him. The businessman no dispute with his neighbor. He may be in business nother community. If the language proposed were to ly, it would prevent such a laboring man from being need by his friend, the employer.

do not think my request is an unreasonable one. I think ould add strength to the provision which has been posed.

Mr. Clark. Mr. President, will the Senator yield?

Mr. Goldwater. I am happy to yield.

Mr. Clark. It occurs to me that, while I certainly recognize the good motives of the Senator from Arizona, the addition to the proviso might well open up an undesirable loophole. The instance cited by the Senator from Arizona is a legitimate one to raise; but, on the other hand, would it not be possible for an employer or association of employers who just did not like unions generally to finance the activities which they are forbidden to finance or encourage merely because, as a matter of philosophy—

Mr. Goldwater. I am not talking about an association in my amendment. I say 'employer.' I refer to a case in which a man who lives next door, or is a friend of the workingman, offers to finance him.

Mr. Clark. I understand. As the Senator from Tennessee knows, I had the privilege of listening to the president of the United States Steel Corp. testify before the Antitrust and Monopoly Subcommittee. He is a fine American and a great businessman, but he just does not believe in unions. From where he sits, perhaps he is right. I would not want him to finance his neighbor in order to break up a union to which he belonged.

Mr. Goldwater. Contrary to what my friend may think, I not only believe in unions; I want them to get bigger and better. I object to the way some of them are run. I would not, for that reason, and for the fear that somebody might dislike a union, want to preclude a friend from using funds which would come under the purview of this section. I want to give him the freedom to use the funds.

Mr. Clark. I am speaking as only one of the sponsors. I dare say it is no secret that this colloquy will enable my colleagues to determine what they want to do. I think I am right, but if my colleagues desire to accept the amend-

ment of the Senator from Arizona, I would have no serious objection to accepting his amendment.

Mr. Goldwater. While the Senators in this part of the Chamber are deciding on the language, I wish to state that the Senator from California did not finish reading his amendment to title II, Reporting by Labor Organizations. It contains the language which is contained in the committee bill, I certainly have no objection to it. I make that statement so the Senator from California will not need to read it.

May I now ask to what conclusion my friend has come about my suggested change?

Mr. Kuchel. I say this, Mr. President, that language is not sufficiently clear to the coauthors of the amendment who are in this part of the Chamber at present for me to stand up and say, 'We accept it.'

The sentence we are discussing, which my friend from Arizona would like to amend by adding more words to it, reads:

> No employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

That is all that clause states. In other words, it would be an unfair practice, it would be against the law, for an employer or an employer association, directly or indirectly, to spend any money or otherwise to get into that type of situation, unless it were a party. Is that not good public policy?

I do believe we ought not to clutter up that language. It is clear. The provision is an attempt to protect a union member who may be engaged in a dispute with the organization. My colleagues would not want me to accept the amendment.

Mr. Goldwater. Let me ask another question. Let us suppose the man to whom we are giving these rights has

no money to enable him to go to court, has no money with which to finance a suit, but has a friend, who is an employer, who says, 'John, I will lend you the mony to go into court —but wait a minute; I cannot do it, because no employer can do it.' Are we not tampering with the basic right of a man to borrow a dollar or two from a friend?

Mr. Mundt. Mr. President, will the Senator yield?

Mr. Goldwater. I yield.

Mr. Mundt. It seems to me he could not go to any bank, either, if the bank is an employer.

Mr. Goldwater. The Senator from South Dakota has made a good point. He could not go to a bank to borrow the money, because the bank would be an employer. In fact, the union member could not borrow it from his own union, because his union is an employer.

Mr. Clark. Mr. President, will the Senator yield?

Mr. Goldwater. I yield.

Mr. Clark. It occurs to me that we ought to make very clear at this point, by the legislative history, if my friend will indulge me, that the somewhat strained construction of the word 'employer' which has been given in the last colloquy is not intended by anybody to apply, and that certainly an employee could go to a bank to borrow money for his defense, and there should not be a shadow of doubt about it.

Mr. Mundt. Could the Senator from Pennsylvania tell us of a bank which is not an employer?

Mr. Goldwater. Under this language the union member could not do it.

Mr. Kuchel. Mr. President, if the Senator from Arizona will yield, it has been suggested by the senior Senator from New York that the word 'interested' could be added in line

4, after the word 'no', so as to make the language read, 'no interested employer or employer association.' If the Senator would accept that amendment, with the legislative history which has been developed, I think it would soive his problem.

Mr. Goldwater. Will the Senator explain what that means?

Mr. Clark. If the Senator will yield, I think it would clearly mean the language would not include a bank.

Mr. Javits. Mr. President, will the Senator yield?

Mr. Goldwater. I understand what it means, but we want to make a legislative history. I want the proponents of this interesting word 'interested' to explain it.

I yield to the Senator from New York.

Mr. Javits. I have in mind the fact that an employer who has an interest in the litigation ought not to bring pressure upon a union. In the eventuation of a relationship of the litigant to the union, an interested employer should not be a party to finance the suit.

We ourselves are so against antibarratry statutes that I do not want to be a party to a law which would prevent a union member from finding a friend, who happens to be an employer of people in a totally unrelated business, a bank or anything else, to loan him the money. We should not have a law to make it impossible to borrow from a friend to start a suit.

Mr. Allott. May I ask a question, for the legislative history?

Mr. Goldwater. I yield.

Mr. Allott. Including the word as the Senator has used it, in the opinion of the Senator would the language include 'any' employer? Let us assume that the employer is in the general grocery business. Would the word 'interested' include any other employer?

Mr. Javits. I think it probably would if the litigation involved the union in the whole line of business, because the words of art are 'employer or employer association.'

Again we have a balance of convenience. Neither side ought to trim this, and that is why I have given the legislative history."